

Appeal from a decision of the Alaska State Office, Bureau of Land Management, acknowledging protests and holding homestead application for further adjudication. F-19508.

Affirmed.

1. Alaska: Homesteads -- Alaska: Native Allotments -- Alaska National Interest Lands Conservation Act: Generally

Sec. 1328(b) of the Alaska National Interest Lands Conservation Act provides that an applicant for a homestead may amend the land description contained in his application if said description designates land other than that which the applicant intended to claim at the time of application and if the description as amended describes the land originally intended to be claimed. If, following notice to the State of Alaska and all interested parties, a protest meeting the requirements of sec. 1328(a)(3) is timely filed against the application as amended, the legislative approval provided by sec. 1328(a)(1) shall not apply.

APPEARANCES: Richard L. Nevitt, pro se; Dennis J. Hopewell, Esq., Office of the Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

Richard L. Nevitt appeals from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated April 26, 1982, acknowledging protests against appellant's homestead application F-19508 and holding this application for further adjudication. Application F-19508 was filed on June 29, 1978, pursuant to 43 U.S.C. § 161 (1970), seeking approximately 160 acres in sec. 33, T. 17 N., R. 38 W., Seward meridian. 1/

1/ The homestead laws were repealed by the Federal Land Policy and Management Act of 1976 (FLPMA), P.L. 94-579, § 702, 90 Stat. 2787, effective on and after Oct. 21, 1976, except such effective date is to be on and after the 10th anniversary of the date of approval of FLPMA, Oct. 21, 1976, insofar as the homestead laws apply to public lands in Alaska. The validity of application F-19508 has been previously addressed by this Board in Richard L. Nevitt, 47 IBLA 257 (1980). An appeal from this decision is presently pending in

BLM's decision acknowledged protests by Daniel J. Owens, filed on June 18, 1981, and August 26, 1981, and by Duane A. Halverson, filed on October 2, 1981. The effect of such protests, BLM concluded, was to require that application F-19508 be adjudicated pursuant to the requirements of the homestead laws. Section 1328 of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. § 3215 (Supp. V 1981), was cited by BLM in support of its decision. Section 1328(a) provides that, subject to valid existing rights, homestead applications filed with the Department within the time provided by applicable law for land available at the time for entry are approved on the 180th day following the effective date of ANILCA, December 2, 1980, unless certain specified protests are timely filed. The 180th day following December 2, 1980, is May 31, 1981.

On May 29, 1981, prior to the effective date of legislative approval of homestead applications, appellant filed with the Alaska State Office an amended description of his homestead claim, entitled "Amended Description of Homestead Claim, Additional to Original Description, in order to Include Lands which may be Additional to Original Entry." 2/ BLM's decision noted that this amendment was filed pursuant to section 1328(b), which states in part:

Richard L. Nevitt v. United States, No. A80-226 (D. Alaska filed July 23, 1980). Ordinarily, it is inappropriate to consider further an application, or amendment thereof, which has been rejected by final Departmental decision and which is currently the subject of judicial review in the Federal courts. In this case, however, the court has by order of Nov. 25, 1981, authorized the Department to further consider pending matters relating to appellant's homestead application.

2/ In a "Notice of Location of Settlement or Occupancy Claim," filed July 2, 1973, appellant set forth his original description. That description follows:

"At approximately Lat. 61-31 by 156-11 Long. in section 33 of T 17n, R38w found on Us GS Sleetmute C-1 map(1954) approximately 980yds from the eastern most river intersection in section 33 and on the North side of the Stony River at the bottom of a ridge and next to the river bank lies corner #1. Corner #1 is further indicated a large cottonwood tree to which is nailed the required bottle and papers and one red band. Go North 1058 yds to corner #2 marked by two red bands on a spruce tree. Go west to corner #3 marked by 3 red bands on a cottonwood tree. Then follow the indicated highest river bank edge back south east to corner #1, approximately 160 acres."

Appellant amended the above original description "in order to include lands which may be additional to those originally described if errors do exist in the original staking or final survey (not yet done), which errors may result in lands existing, which were originally intended to be claimed, outside those lands described in the original description." (Emphasis supplied.) Amended description, May 29, 1981. On June 1, 1981, appellant corrected an omission in his May 29 description. The amended description reads:

"From original corner #1 as described in 7-2-73 F 19508 notice of settlement and location; commence in a northerly direction 1375 feet, along and extending a line running from said original corner #1 to a point 75 feet true east (90 degrees 0') of the southeast corner of the only cabin located approximately 100-200 yds northerly from corner #1; thence true west (270 degrees 0') to the point where this line intersects the eastern boundary of the original description (7-2-73 F 19508); thence return southerly along the common line between the eastern boundary of original description and the western boundary of this amended description to the point of beginning: Corner #1."

(b) An applicant may amend the land description contained in his or her application if said description designates land other than that which the applicant intended to claim at the time of application and if the description as amended describes the land originally intended to be claimed. If the application is amended, this section shall operate to approve the application or to require its adjudication, as the case may be, with reference to the amended land description only: Provided, That the Secretary shall notify the State of Alaska and all interested parties, as shown by the records of the Department of the Interior of the intended correction of the entry's location, and any such party shall have until the one hundred and eightieth day following the effective date of this Act or sixty days following mailing of the notice, whichever is later, to file with the Department of the Interior a protest as provided in subsection (a)(3) of this section * * *.

BLM notified Dan Owens, Duane Halverson, and the State of Alaska about appellant's amended land description, and thereafter protests from Owens and Halverson were timely received. 3/

The statutory provisions of section 1328 of ANILCA apply only to applications which were pending as of the date of enactment of ANILCA. See Carmel J. McIntyre (On Judicial Remand), 67 IBLA 317, 331 (1982). The record discloses that suit for judicial review of the final Departmental decision rejecting appellant's application had been commenced prior to passage of ANILCA. Further, the application F-19508 still appears of record on the master title plat for the township. Thus, appellant's claim may be considered.

In his statement of reasons on appeal, appellant maintains that he is entitled to legislative approval of those lands described in his June 29, 1978, homestead application. Adjudication by BLM should be limited to the "amended portion" of his entry in appellant's view.

On behalf of BLM, the Solicitor's Office has referred the Board to the legislative history of section 905(b) of ANILCA, a section dealing with Alaska Native allotments but containing language virtually identical to that in section 1328(b). Senate Report No. 96-413 is set forth in part:

A significant percentage of Alaska Native allotment applications do not correctly describe the land for which the applicant intended to apply. Technical errors in land description, made either by the applicant or by the Department in computing a metes-and-bounds or survey description from diagrams, are subject to

3/ BLM mailed to Owens on Aug. 4, 1981, a notice of appellant's amended description. Owens' first protest was filed on June 18, 1981, prior to BLM's notice but at a time when he had received actual notice of the amendment. A second protest was filed on Aug. 26, 1981. BLM mailed a similar notice to Halverson on Aug. 4, 1981, but this notice was later remailed on Sept. 15, 1981, because it had been first mailed to an incorrect address. Halverson's protest was filed with BLM on Oct. 2, 1981. All protests were timely filed in accordance with section 1328(b).

correction under authority of Section 905(c). In accordance with the Department's existing procedures for the amendment of applications, subsection (c) requires that the amended application describe the land the applicant originally intended to apply for and does not provide authority for the selection of other land. The allotment application, as amended, is subject to statutory approval or adjudication under the terms of Section 905 on the basis of the corrected land description. The Secretary is required, however, to notify the State of Alaska and other interested parties of the requested amendment prior to approving it. Protests submitted pursuant to Section 905(a)(5) in response to allotment amendments are timely if received by the Department within sixty days of the mailing of notice of amendment, even if the 180 day protest period provided in subsection (a)(5) has expired. (Emphasis added.)

S. Rep. No. 413, 96th Cong., 1st Sess. 286, reprinted in 1980 U.S. Code Cong. & Ad. News 5070, 5230.

The language underscored above does not comport with appellant's position. If an amended land description is filed, the legislative history provides that legislative approval or adjudication shall be on the basis of the corrected land description. This legislative history is consistent with the language in section 1328(b), quoted supra, providing for approval or adjudication "with reference to the amended land description only." (Emphasis supplied.) In the instant case, the amended or corrected land description refers to the total parcel that appellant intended to claim and not simply to those additional lands described by his May 29, 1981, filing.

With respect to the protests themselves, appellant maintains that the protests of Owens and Halverson are merely unsubstantiated allegations and fail to meet the requirements of section 1328(a)(3). Owens' nearby homesite has been canceled, appellant charges, and Halverson has relinquished his rights to "a certain cabin" and land. In appellant's view, the protest of Owens contains untrue statements.

[1] Subsection 1328(a)(3) sets forth the requirements for a protest sufficient to compel adjudication of a homestead application. Subpart (C) requires that a protest by a person or entity state that the applicant is not entitled to the land described in the application and that said land is the situs of improvements claimed by the person or entity. The protest of Duane Halverson is set forth in full:

I am writing the Bureau of Land Management in regards to a Homestead Claim F01-9508 filed by Richard Lee Nevitt. At this time, I would like to file a protest of legislative approval under public law 96-487 section 1328.

In the fall (Aug-Oct) of 1973 I homesteaded on the Stoney River at the site that Homestead Claim F01-9508 is supposedly located on. At that time I was informed by the claimant of F01-9508 that his cornerpost No. 1 was located approximately 1/4 mile down river from the cabin that I with the help of Dan

Owens had built. I in fact witnessed his corner post number 1 which was in fact approx. 1/4 mile from my cabin. It is of my belief that claim F01-9508 was altered to include my cabin and homesite claim and the claims surrounding mine. I reason that the place that cornerpost No. 1 for claim F01-9508 had been located at originally could have never included my cabin or claim and there was never an agreement with myself and Richard Lee Nevitt that the cabin should ever be his to claim.

We find that the above-quoted protest of Duane Halverson fully satisfies the requirements set forth at section 1328(a)(3)(C) for a protest. Halverson's statement that appellant's claim encroaches upon Halverson's homesite and includes Halverson's cabin is a sufficient allegation that appellant is not entitled to the land described in homestead application F-19508 and that such land is the situs of improvements claimed by Halverson. In light of this finding, there is no need to examine the protests of Dan Owens. A timely and sufficient protest having been filed, BLM properly held homestead application F-19508, as originally described and thereafter amended, for adjudication.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Alaska State Office is affirmed.

Anne Poindexter Lewis
Administrative Judge

We concur:

C. Randall Grant, Jr.
Administrative Judge

Douglas E. Henriques
Administrative Judge

